UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
X----------x

UNITED STATES OF AMERICA,

07-CR-202 (JBW)

-against-

MEMORANDUM & ORDER

ACESHUNN BROWN

X----------x

JACK B. WEINSTEIN, Senior District Judge:

I. Introduction

Defendant moves to suppress a handgun seized at the time of his arrest in February 2007, an oral statement made to a bystander which was overheard by law enforcement officers and a written statement made to a detective twelve hours after his arrest. He argues that suppression is required because the arresting officers seized him without reasonable suspicion of criminal activity.

On June 19, 2007, the court conducted an evidentiary, at which police officers Diana Pichardo and Sean Feliciano testified regarding the defendant's arrest. ("Tr. June"). On July 5, 2007, the court continued the evidentiary hearing and heard testimony from Detective Edward Barbot, who advised the defendant of his *Miranda* rights and witnessed the defendant's subsequent confession. (Tr. July). Defendant submitted no evidence.

The prosecution's witnesses were credible. The evidence demonstrates that the defendant's motion should be denied.

II. Facts

On February 8, 2007, New York City Police Department (NYPD) officers Diana Pichardo, Sean Feliciano and two other officers were patrolling the 71st precinct in an unmarked car. Officer Pichardo is a five-year veteran of the NYPD. She has been assigned to the Street Narcotics Enforcement Unit for the last two years. She was previously assigned to an NYPD group tasked with writing summonses for illegal use of alcohol.

At approximately 11:10 p.m. the officers stopped near "Frankie's," a bodega at 348 Rogers Avenue in Brooklyn, because one of them observed several individuals who appeared to be drinking and smoking marijuana inside the store. Officer Pichardo testified that Frankie's is a "known location" where illegal activities often take place. (Tr. June at 6). During the three years when officer Pichardo was checking for illegal use of alcohol, she had issued summonses to individuals drinking alcoholic beverages inside "Frankie's" and other bodegas for violating the New York City Administrative Code section 10-125(b), the open container law. (Tr. June at 11).

The four plain clothes officers entered the store displaying their NYPD shields on neck chains. None had a weapon exposed. They observed several individuals who appeared to be drinking alcoholic beverages and smoking marijuana. As soon as they crossed the store's threshold officers Pichardo and Feliciano saw the defendant drinking a bottle of beer. When defendant saw officer Pichardo he put the open beer bottle down and tried to walk away. He had one hand partially tucked into his waistband as if he were concealing something.

As officer Pichardo approached defendant, he backed away, appearing to be attempting to leave the store. She ordered him to stop and show his hands. She repeated this order to show his hands several times in order to assure her safety because "his actions were suspicious." (Tr. June at

14). The defendant "kept moving" and "fidgeting around." As she got closer, officer Pichardo "saw a butt of a gun" sticking out of defendant's waist band. (Tr. June at 13-15).

After officer Pichardo saw the butt of a gun sticking out from behind the defendant's hand, which he still refused to remove from his waistband, she "stopped and . . . held his hand . . . and pulled out the gun." (Tr. June at 17). The defendant then began "struggling with [her], fighting with [her], holding the gun"; she "was worried for [her] safety." (Tr. June at 17). After other officers came to her assistance, officer Pichardo removed the gun from the defendant's waistband and handed it to Office Feliciano, who unloaded it. (Tr. June at 18, 48).

The defendant was restrained and escorted out of the store. As he was leaving, he told a woman outside the store while passing her, "they found the gun, take care of that shit." (Tr. June at 19). Without being asked, he volunteered to officer Pichardo that the woman was his sister. (Tr. June at 19). Both these statements were made spontaneously without any prompting from a police officer. (Tr. June at 19).

The defendant was taken to the 71st Precinct and kept there overnight. There is no evidence on whether he slept or was fed. Since no proof on that score was submitted, and he is a mature adult who appeared capable of speaking up if he were uncomfortable, it is assumed that he was properly treated.

The next morning, twelve hours after his arrest, Detective Barbot, who had not been present at the arrest, met with the defendant. Officers Feliciano and Pichardo were not present at the interview. (Tr. July at 6). Defendant was advised of his *Miranda* rights and signed a written waiver of those rights. (Tr. July at 5). Only then did defendant make a statement. The defendant never requested an attorney. (Tr. July at 8).

Detective Barbot testified that he only spoke with the defendant briefly before he made his statement and that the tone of the conversation was "pretty easy going." (Tr. July at 10). The detective asked the defendant what the circumstances were that led to his arrest. The defendant then made an oral and a written statement in which he admitted possessing the firearm. (Tr. July at 6-8).

III. Law

A. New York City's "Open Container Law," NYC Administrative Code § 10-125

Section 10-125(b) of the New York City administrative code states, "[n]o person shall drink or consume an alcoholic beverage, or possess, with intent to drink or consume [from], an open container containing an alcoholic beverage in any public place except a block party, feast or similar function for which a permit has been obtained."

Section 10-125 (a)(5) defines a "public place" as:

> A place to which the public or a substantial group of persons has access including, but not limited to, any highway, street, road, sidewalk, parking area, shopping area, place of amusement, playground, park or beach located within the city except that the definition of a public place shall not include those premises duly licensed for the sale and consumption of alcoholic beverages on the premises or within their own private property. Such public place shall also include the interior of any stationary motor vehicle which is on any highway, street, road, parking area, shopping area, playground, park or beach located within the city.

Interpreting the "open container law," the New York Supreme Court for Bronx County discussed the breadth of the term "public place." *People v. Medina,* 2007 WL 1341357 (N.Y. Sup. 2007). It found that the use of the phrase "including, but not limited to" in the statute signaled an intention that the list of public places which follows was illustrative, not exhaustive. *Id.* at *5. The Court went on to hold that the "sweeping definition" of public place contained in the open container law "can and does include the common areas of apartment buildings to which a substantial group of persons have access." *Id.*

B. *Terry v. Ohio*

"Under *Terry v. Ohio*, 392 U.S. 1 (1968), police may briefly detain an individual for questioning if they have a reasonable suspicion that criminal activity is afoot, and may frisk him if they reasonably believe he is armed and dangerous." *U.S. v. Elmore*, 482 F.3d 172, 178 (2d Cir. 2007) (*citing United States v. Colon*, 250 F.3d 130, 134 (2d Cir.2001)). A Terry stop allows police to pursue a limited investigation when they lack information necessary to establish probable cause to arrest. *Adams v. Williams*, 407 U.S. 143, 145-46 (1972).

Reasonable suspicion requires more than an "inchoate and unparticularized suspicion or hunch."*U.S. v. Elmore*, 482 F.3d at 178 (citations omitted). "Like probable cause, reasonable suspicion is determined based on the totality of the circumstances but 'the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" *Id.* at 179. "In determining whether [an] officer acted reasonably in such circumstances due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. at 27.

Though the presence of a person in a neighborhood known for its high incidence of narcotics or other crimes does not alone create reasonable suspicion to stop, *see Brown v. Texas*, 443 U.S. 47, 53 (1979), or probable cause to arrest, see *United States v. Green*, 670 F.2d 1148, 1152 (D.C.Cir.1981), the character of the area as a focus of crime may enter into the reasonable suspicion calculus of a law enforcement officer.

Once an officer makes a reasonable investigatory stop, if "the officer is justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently

dangerous to the officer or to others," the officer may "take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

C. Exclusion of Post Arrest Statements

Evidence obtained in violation of the Fourth amendment may be subject to exclusion as "fruit of the poisonous tree." It is not necessarily

> 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun v. United States, 371 U.S. 471, 488 (1963).

When subsequent to an illegal arrest a defendant is given *Miranda* warnings and then makes a statement the government must prove that the statement was sufficiently uninfluenced by the illegal arrest to remove its taint. "The issuance of *Miranda* warnings and the signing of a waiver are important indicators of whether a statement has been obtained by exploitation of [the] illegality." *United States v. Thompson*, 35 F.3d 100, 106 (2d Cir. 1994).

Relevant factors in determining whether a statement has been purged of taint include the temporal proximity of the illegal seizure and the contested statement, the presence of intervening circumstances, and the purpose and flagrancy of any official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975).

The prosecution bears the burden of showing admissibility. *Id.*

IV. Application of Law to Facts

A. New York City's "Open Container Law," NYC Administrative Code § 10-125

Section 10-125(b) can be reasonably construed to prohibit drinking alcohol in a bodega. A bodega, such as the one at 348 Rogers Avenue, is a "place to which the public or a substantial group of persons has access" and as such is a public place for purposes of the open container law.

This reading accords with the decision of the New York Supreme Court for Bronx County in *People v. Medina.* If the lobby of an apartment building constitutes a public place under the statute then so too does a bodega. The public has greater access to a grocery store than to an apartment building where entrants presumably must be present by invitation of one of the building's residents. Any individual can walk off the street and enter a bodega.

While section 10-125 is subject to a variety of possible statutory interpretations, given its language, the interpretation in *Medina*, and officer Pichardo's prior enforcement of it in bodegas, it was objectively reasonable for her to conclude that the defendant was committing a crime. Having observed what she reasonably believed was the defendant committing a crime, officer Pichardo, in order to assure her safety, repeatedly requested that defendant show his hands. When the defendant refused and acted suspiciously, officer Pichardo observed the butt of a gun in his waistband. Upon seeing the gun she took appropriate action in removing defendant's hand from his waistband and then removing the gun from his possession. Her actions were reasonable precautions taken to ensure her safety and that of the other police officers with her. *See People v. Bothwell,* 261 A.D.2e 232, 233-34 (N.Y. AD. 1999) (noting that a "police officer is authorized to arrest a person believed to have violated the open container law").

B. *Terry v. Ohio*

Even if the defendant had not been committing a crime officer Pichardo still had reasonable suspicion to stop and frisk him. Officer Pichardo is a five-year veteran of the NYPD who spent three years enforcing New York City's alcohol laws. Given her experience and the fact that Frankie's is a "known location" for illegal activities it was reasonable for her to conclude that the defendant's actions were suspicious. The defendant appeared nervous upon seeing the officers and quickly put his beer down and attempted to leave the premises. Officer Pichardo reasonably concluded that criminal activity was afoot. To ensure her safety during a lawful stop of the defendant she repeatedly requested that defendant remove his hand from his waistband. Once the defendant refused, officer Pichardo had ample ground to believe that defendant might be armed and dangerous.

C. Exclusion of Post Arrest Statements

The defendant has not challenged the adequacy of the *Miranda* warnings he received subsequent to his arrest. Nor has he claimed that his statements were made involuntarily. Defendant does argue, however, that his post arrest statements, both the oral one, made immediately after his arrest, and the one made the next day, should be suppressed as "fruits of the poisonous tree." Since the actions of officer Pichardo were proper defendant's contention is without merit.

In any event, the defendant's oral statement at the time he was arrested was not the product of police conduct. It was made spontaneously to a bystander without any questioning or prompting from the arresting officers. The defendant's written statement, made twelve hours later, was sufficiently separated from the arrest to attenuate any alleged taint. It does not constitute "fruit of the poisonous tree." Prior to the defendant making any statement Detective Barbot informed him of his *Miranda* rights and defendant signed a written waiver of those rights. Detective Barbot testified that the tone of his conversation with the defendant was "pretty easy going" and they only

spoke briefly before the defendant made his statement. Neither officer Pichardo nor officer Feliciano were present during the interview. Defendant's written statement was not obtained by the exploitation of the alleged illegality.

V. Conclusion

The defendant's motion to suppress is denied in its entirety.

SO ORDERED.

_____

Jack B. Weinstein
Senior United States District Judge

Dated: July 25, 2007
Brooklyn, NY